expressly defined as covered situses. Pet. App. XIX. The court concluded that

> an "other adjoining area" as to which coverage extends must be *like* a "pier," "wharf," "dry dock," "terminal," "building way," or "marine railway." Each of these enumerated "areas" is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shoreside structure or facility.

Id. at XX (footnote omitted). The court also deemed it "inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area.'" *Id.* at XXI.

Applying its test to the facts of this case, the court concluded that respondent's container-repair shop was not a covered situs. Pet. App. XXV-XXVI. The court concluded that the shop itself, while arguably an "area" within the meaning of Section 903(a), did not "adjoin" navigable waters. Pet. App. XXVI. The court further asserted that the tract of land extending from the water to and including the shop was not an "area" within the meaning of the Act. *Ibid.*[3]

The court also rejected the Director's argument that it should defer to his interpretation of the situs requirement. Pet. App. XXVI-XXX. The court held that LHWCA Program Memorandum No. 58 (1977), upon which the Director relied, did not clearly con-

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[3] The court also stated that it would reach the same result under the *Brady-Hamilton* test or a "totality of the circumstances" test adopted by the Fifth Circuit. Pet. App. XXVI n.12.

stitute an agency interpretation of the Act, since it did not attempt to define a general rule or test for the pertinent statutory phrase or otherwise purport to interpret the Act. Pet. App. XXVII. The court noted as well that the document was an internal memorandum, and therefore, in its view, was entitled to less deference than a formal agency interpretation. *Id.* at XXVII-XXVIII. The court also stated that it was "not certain in any event that the 1977 Memorandum contradicts our interpretation of the statute." *Id.* at XXVIII. Finally, the court held that, if the Memorandum sets forth a formal agency interpretation of Section 903(a), and if that interpretation would extend the Act's coverage to areas that do not adjoin navigable waters, then the Memorandum is contrary to the plain language of the Act and for that reason is not entitled to deference. Pet. App. XXIX-XXX.[4]

The court of appeals subsequently considered a sua sponte suggestion of rehearing en banc and, on an 8-5 vote, denied the suggestion. Pet. App. LXIV-LXV.

ARGUMENT

If the court of appeals' opinion is read to require strict contiguity between a particular place of business and navigable waters, its holding creates a conflict among the circuits and would subvert the effective implementation of the LHWCA. We believe, however, that the opinion below is susceptible of a more limited reading. Even if a square circuit conflict existed, moreover, the instant case would be an

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[4] In a concurring opinion, District Judge Beaty stated that he would apply the Ninth Circuit's *Brady-Hamilton* test and would affirm the ALJ's ruling under that standard. Pet. App. XXX-XXXIII.

inappropriate vehicle for its resolution. The petition for a writ of certiorari should therefore be denied.

1. Prior to the Fourth Circuit's decision in this case, the courts of appeals had consistently held that a maritime facility may be covered by Section 903(a) even if it is not contiguous to navigable waters. Thus, the Ninth Circuit in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978) (Kennedy, J.), held that a gear locker (a building for storage and repair of stevedoring equipment) located 1/2 mile from a navigable river and only a little less from the gate of the port was a covered situs. In so holding, the court rejected the argument that the locker did not "adjoin" navigable waters because it was not contiguous to the river. The court reasoned that, in light of the purposes underlying Congress's 1972 expansion of LHWCA coverage landward, see pages 13-15, *infra*, the phrase "adjoining area" should be interpreted by reference to a "functional relationship that does not in all cases depend upon physical contiguity." 568 F.2d at 141.

The court in *Brady-Hamilton* identified four factors that "among others" should be considered in determining whether a location is a covered "adjoining area": (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to maritime uses; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all of the circumstances. 568 F.2d at 141. Applying that analysis, the court noted that all of the machinery and equipment in the gear locker was used for the loading and unloading of vessels; that adjacent buildings were used as gear lockers; and that the locker was as close

to the ships as was feasible, given that "the water's edge can only accommodate a limited number of warehouses and other docking facilities." *Ibid.* The court concluded that the "facility * * * was used as an integral part of longshoring operations," and therefore was a situs covered by the Act. *Ibid.*

In *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), the court held that a gear locker five blocks from the nearest dock was a covered situs. Like the court in *Brady-Hamilton*, the Fifth Circuit rejected the argument that, for LHWCA jurisdiction to attach, there must be "an uninterrupted line of maritime facilities between the locus of the injury and the water." 632 F.2d at 513. The court observed that the term "adjoining" can mean "neighboring," as well as "contiguous to," and concluded that the former definition is more in keeping with congressional intent. *Id.* at 514. In the court's view, the best way to effectuate the congressional purpose of the 1972 amendments was to "determine the situs question by looking at all the circumstances." *Id.* at 513. The boundaries of the Section 903(a) "area," the court further concluded, should be broadly defined by function, and an "area" falls within the coverage of the LHWCA if it is used customarily, although not exclusively, by employers in loading, unloading, repairing, or building a vessel. 632 F.2d at 515.

Looking at all the circumstances, the Fifth Circuit in *Texports Stevedore* noted that the gear room was not outside the waterfront area customarily used by employers for gear rooms; that it was in the most desirable position for serving the docks and as close a position as feasible; and that the gear rooms of most stevedores were not on the docks proper. 632 F.2d at

515. The court therefore upheld the ALJ's finding that the gear room was in an area customarily used by employers for loading, that that general area adjoined the waterway, and that the gear room itself had a "sufficient nexus to the waterfront" for LHWCA coverage to attach. *Ibid.*[5]

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[5] In *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95 (1991), the Second Circuit, citing *Brady-Hamilton* and *Texports Stevedore*, held that an employee driving a vehicle that was moving cargo between a dockside stevedore facility and a rail yard, who was injured at the latter site, was covered by the LHWCA. The court of appeals held that "[t]he 1 1/4 mile journey to [the rail facility], a journey that is more around the Elizabeth Channel than away from it, is a necessary trip and is, therefore, integral to the loading of cargo." 932 F.2d at 101. In support of its ruling, the court noted that "[i]t [was] generally understood that a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a maritime operation." *Id.* at 100 (internal quotation marks omitted). The court also noted that the 1972 LHWCA amendments reflected a "congressional intent to reduce the importance of situs as applied to employees who might otherwise be covered for only a part of their work." *Id.* at 101 (quoting *Cove Tankers Corp.* v. *United Ship Repair, Inc.*, 683 F.2d 38, 42 (2d Cir. 1982)). Although the precise geographic relation of the site of the injury to navigable waters is somewhat unclear from the court's decision, the Second Circuit appears to be in general agreement with the Fifth and Ninth Circuits' approach to the situs inquiry.

The Third Circuit in *Sea-Land Serv., Inc.* v. *Director, OWCP*, 540 F.2d 629 (1976), held that a truck accident on a public street in a "marine terminal area," one-half mile from the nearest water and one-third mile from the nearest terminal, occurred at a situs covered under the Act. The court held that the line "delimiting the outer reaches of the Act's extended coverage is * * * functional and not spatial." *Id.* at 636. It concluded that "[t]he limits of federal coverage is defined not by reference to a geographic relationship with the

2. The Office of Workers' Compensation Programs (OWCP), in an administrative interpretation issued in 1977, concluded that a facility could be a Longshore Act situs even though outside of the fence line or boundary of a terminal that is directly contiguous to the water. Discussing "[s]itus" in the context of "longshoring operations," the LHWCA program memorandum explained that marine terminals are covered in their entirety despite their increasingly large size. See LHWCA Program Memorandum No. 58, at 10-11 (1977). The memorandum concluded:

> In areas in which additional space immediately adjacent to the previously established boundaries of a waterfront pier or terminal is not available for the expansion required by modernization, * * * *such facilities as "gear lockers"—buildings in which stevedoring equipment is maintained and stored (and sometimes fabricated)—may be located outside the fenced boundaries of a terminal.* Such facilities are in practical fact integral parts of the maritime terminal, existing and being used solely for the loading and discharge of ships; they should be regarded as extensions of the terminals to which they relate. Hence, *although they do not themselves adjoin the water, they are*

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navigable waters * * * but by the location of the interface between the air, land and the water modes of transportation." *Id.* at 638. "[A]s long as the employment nexus (status) with maritime activity is maintained," the court held, "the federal compensation remedy should be available." *Ibid.* The Third Circuit's analysis, however, was repudiated by this Court in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278 n.40 (1977), which noted that *Sea-Land* "appears to have essentially discarded the situs test."

> *parts of terminal complexes which do, and are within the Act.*

Id. at 11 (emphases added).[6]

3. As the court of appeals acknowledged, see Pet. App. XVI, the term "adjoining" is susceptible to more than one meaning. The term may mean "contiguous," but it also can reasonably bear the broader meaning of "neighboring" or "close to." See *Texports Stevedore*, 632 F.2d at 514 & nn.17-18 (citing dictionary definitions of "adjoin" and "adjoining"). The term "area" is similarly susceptible to a functional construction that eschews rigid reliance on fence or property

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[6] Congress has conferred on the Secretary broad authority to administer the LHWCA, 33 U.S.C. 939(a), and his delegate, the Director, OWCP, 20 C.F.R. 701.202, is the policymaker under the Act whose views on questions of statutory or regulatory interpretation are entitled to deference. *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Jones* v. *Director, OWCP*, 977 F.2d 1106, 1110 (7th Cir. 1992); *Force* v. *Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of analogous Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is entitled to deference). But see *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *American Ship Bldg. Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (neither Benefits Review Board nor Director is entitled to deference). The 1977 Program Memorandum, issued over the signature of the highest agency official with administrative authority for the LHWCA program, stated in its cover letter that it "reflect[ed] OWCP's position on the amended coverage of the Act." It remains the agency's most definitive construction of the statutory provision at issue here.

lines.[7] Resolution of those ambiguities should be informed by consideration of the history and purpose of Section 903(a), which indicate that the LHWCA's coverage may extend to a maritime facility that is not itself strictly contiguous to navigable waters.

Until 1972, the LHWCA extended coverage only to injuries that occurred "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970). As a result of that limitation on

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[7] The 1977 OWCP Program Memorandum's statement that a gear locker may be a covered situs even where it is "located outside the fenced boundaries of a terminal" is consistent with the subsequent decisions of the Ninth and Fifth Circuits in *Brady-Hamilton* and *Texports Stevedore*. That conclusion, it should be noted, can be derived by either of two interpretive routes. The Program Memorandum took the position that such facilities are covered by the Act because "although they do not themselves adjoin the water, they are parts of terminal complexes which do." Program Memorandum at 11. That view does not contest the proposition that "adjoining" means "contiguous"; it rests instead on the premise that an "area" within the meaning of Section 903(a) may extend beyond a particular parcel of property, such that a maritime terminal and a neighboring gear locker may be said to comprise a single complex or "area." The Ninth Circuit in *Brady-Hamilton*, by contrast, appeared to regard the gear locker itself as the relevant area, and concluded that the locker was properly treated as an "adjoining" area despite the fact that it did not abut the water. See 568 F.2d at 141. The Fifth Circuit in *Texports Stevedore* accepted both arguments. It concluded that the gear locker itself was properly regarded as "adjoining" the water, on the theory that "'[a]djoining' can mean 'neighboring.'" 632 F.2d at 514. In the alternative, it stated that the locker would be covered even if strict contiguity to navigable waters were required, because the locker "was not clearly outside the waterfront area customarily used by employers for gear rooms," and the waterfront area abutted a navigable waterway. *Id.* at 515.

coverage, benefits awarded to longshore or harbor workers could vary substantially depending upon the side of the water's edge on which an accident occurred. See generally *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 260-263 (1977); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 12-13 (1972). That disparity was of particular concern because "with the advent of modern cargo-handling techniques, such as containerization, * * * more of the longshoreman's work is performed on land than heretofore." H.R. Rep. No. 1441, *supra*, at 10; S. Rep. No. 1125, *supra*, at 13. Congress amended the Act in 1972, expanding its coverage to specified landward situses and to "other adjoining area[s] customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). That expansion of coverage was designed to "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." H.R. Rep. No. 1441, *supra*, at 10-11; S. Rep. No. 1125, *supra*, at 13.[8]

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[8] The 1972 amendments also imposed a new "status" requirement by amending the Act's definition of "employee." Because Congress did not wish to extend coverage to all workers who might be injured in the newly covered landward areas, it limited the Act's coverage to "persons engaged in maritime employment." 33 U.S.C. 902(3); see note 1, *supra*. The amendment ensures that workers not engaged in maritime employment, such as workers picking up stored cargo for transshipment or purely clerical workers not involved in loading or unloading, would not be covered even if injured in the adjoining land area newly subject to LHWCA coverage. H.R. Rep. No. 1441, *supra*, at 11; S. Rep. No. 1125, *supra*, at 13.

Section 903(a) should therefore be construed in a manner that will reduce the number of workers walking in and out of LHWCA coverage and promote uniformity of benefits among maritime employees. *Brady-Hamilton*, 568 F.2d at 140-141; *Reynolds* v. *Ingalls Shipbuilding Div., Litton Sys., Inc.*, 788 F.2d 264, 271-272 (5th Cir.), cert. denied, 479 U.S. 885 (1986). A rigid requirement that particular places of business be directly contiguous to navigable waters would "reenact the hard lines that caused longshoremen to move continually in and out of coverage * * * [and] frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity." *Texports Stevedore*, 632 F.2d at 514-515. See also *Brady-Hamilton*, 568 F.2d at 141 ("[i]n order to further Congress' goal of uniform coverage, the phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity"); *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95, 101 (2d Cir. 1991).

4. We do not read the court of appeals' opinion in this case as establishing a rigid rule that a particular maritime facility must directly abut navigable waters in order to fall within the coverage of Section 903(a). The court was, we acknowledge, unequivocal in its construction of the term "adjoining," holding that "an area is 'adjoining' navigable waters only if * * * it is 'contiguous with' or otherwise 'touches' such waters." Pet. App. XVII. The court did not, however, essay a precise definition of the term "area." Although the court expressed the view that "some notion of property lines will be at least relevant" in determining the scope of a covered "area," *id.* at XXI, it did not hold that a business's placement beyond the

fence line of a maritime terminal would invariably exclude it from the coverage of Section 903(a). To the contrary, the court stated that it was "not certain * * * that the 1977 [OWCP] Memorandum contradicts our interpretation of the statute." Pet. App. XXVIII. It simply concluded that "the expanse of property between the navigable waters and [respondent's container-repair shop] (together with structures and facilities that occupy that property) * * * is not an 'area' within the meaning of the statute." *Id.* at XXVI. Until the Fourth Circuit has considered the application of Section 903(a) to a broader range of factual settings, we believe that review by this Court would be premature.

Even if the court of appeals' decision were construed as creating a square conflict among the circuits, moreover, the instant case would not furnish an appropriate vehicle for resolution of that conflict. The panel majority held (albeit without extensive analysis) that respondent's container-repair shop would fall outside the coverage of Section 903(a) even under the test adopted by the Ninth Circuit in *Brady-Hamilton*. Pet. App. XXVI n.12. The concurring judge reached the same conclusion, see *id.* at XXX, as did the ALJ and the Board, see *id.* at LI-LXIII, XXXIV-XLVIII. That fact-bound conclusion provides an independent basis for the court of appeals' judgment. While the correctness of that alternative holding is open to question, application of the appropriate functional analysis to the facts of a particular case raises no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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